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No. 94-1968

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

J. DON ADAMS, et al.,

Petitioners,

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Sixth Circuit's order remanding this case to the District Court for an evidentiary hearing on virtual representation renders the case not yet ripe for review.

2. Whether the petitioners had sufficient minimum contacts with the District Court to allow its exercise of personal jurisdiction over them.

3. Whether the District Court, having personal jurisdiction over petitioners, could, under the traditional doctrines of *res judicata* and collateral estoppel, enjoin them from relitigating claims already decided.

4. Whether the District Court's March 24, 1992 Order regarding communications between petitioners and their counsel, which lapsed over three years ago upon the failure of the provisional class settlement, is moot.

5. Whether the District Court's March 24, 1992 Order permitting class counsel to communicate directly with petitioners and directing all counsel to impart "accurate, objective, balanced information" regarding the provisional settlement was a proper exercise of the District Court's powers under Fed. R. Civ. P. 23(d) to control the conduct of class actions.

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Respondents Shelter Seagate Corporation, Can-American Corporation, Can-American Realty Corporation, Garrett G. Carlson, Arni C. Thorsteinson and Graham C. Lount (collectively "Shelter Seagate"), submit this brief in opposition to petitioners' request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

STATEMENT OF THE CASE

1. Proceedings Before and Opinions of the District Court

Petitioners are members of a plaintiff class in an action brought pursuant to Fed. R. Civ. P. 23(b)(3) in August of 1989, in the United States District Court for the Eastern District of Michigan. The plaintiff class (sometimes referred to herein as "unit owners") sought damages for alleged securities and common law fraud, other torts, and breaches of contract in connection with the construction and sale of the Registry Resort Hotel, a 474-room luxury hotel in Naples, Florida.

On November 19, 1990, the District Court, prior to class certification, granted summary judgment for all defendants on one of three fraud claims alleged by plaintiffs and reserved ruling on the summary judgment motions relating to the two remaining fraud claims. *Becherer v. Merrill Lynch, Pierce, Fenner & Smith*, 799 F. Supp. 755, 782-84 (E.D. Mich. 1992). Recognizing that plaintiffs' fraud claims arose out of contract claims, the District Court certified a class and ordered an expedited, bifurcated trial on the contract claims against only Shelter Seagate, the developer of the hotel. All of the petitioners participated as class members in the expedited contract trial.

After the certified class tried its contract claims against Shelter Seagate to the District Court, but before the Court's decision, the parties reached a provisional class settlement of all claims against all defendants. The District Court approved notice of the provisional settlement which was sent to each unit owner. Petitioners, who

had opted in for the contract trial against Shelter Seagate, opted out of the provisional settlement. The settlement failed when an excess number of unit owners opted out.

After the settlement failed, the District Court rendered its decision holding that Shelter Seagate breached its contract with the unit owners by leasing certain furniture, fixtures and equipment for the hotel. It awarded the class, which included all petitioners, judgment against Shelter Seagate for $6.7 million. The District Court then granted summary judgment in favor of all defendants dismissing all plaintiffs' remaining claims, including their fraud claims. *Id.*

After petitioners learned that they had lost before the District Court they served Merrill Lynch with a lawsuit they had earlier filed in Collier County, Florida, asserting the same claims that had been dismissed by the District Court. The District Court enjoined the relitigation in Florida, under the religitation exception to the Anti-Injunction Act, 28 U.S.C. § 2283, holding that the injunction was necessary "to protect and effectuate its judgments." *Becherer v. Merrill Lynch, Pierce, Fenner & Smith,* 809 F. Supp. 1259, 1271 (E.D. Mich. 1992).

Petitioners opposed the injunction, arguing that because all claims against all defendants were not certified as a class action, the District Court lacked personal jurisdiction over the petitioners necessary to enjoin them from relitigating their claims. The District Court rejected the petitioners' argument holding:

> Florida plaintiffs also argue that this court does not have personal jurisdiction over them because no class was ever certified for purposes

> of the Merrill Lynch fraud claims. . . . Counsel for Florida plaintiffs confuses the concept of personal jurisdiction with the res judicata issue. I have personal jurisdiction over the Florida plaintiffs because they are parties to the case before me through their representatives. They also are members of the class in the breach of contract trial which I conducted, and as such are bound by the results of that trial. For these reasons, I conclude that there is personal jurisdiction over them. As Merrill Lynch properly points out, the Florida plaintiffs cannot claim that this court has personal jurisdiction over them in order to collect the $6.7 million judgment from Shelter Seagate, of which they are recipients as members of the plaintiff contract class, and then turn around and say that this court does not have personal jurisdiction over them with respect to the other issues in the case.

Becherer, 809 F. Supp. at 1270 (footnote omitted).

2. The Decision on Appeal

The Sixth Circuit affirmed the District Court's holding that it had personal jurisdiction over the petitioners without comment. The Court of Appeals held, however, that the District Court used an impermissibly broad definition of virtual representation, one of the elements it relied upon to find the petitioners in privity with the named plaintiffs. It vacated the injunction and remanded the case to the District Court to conduct an evidentiary hearing on whether *res judicata* and collateral estoppel would bar relitigation of the claims already decided by the District Court. The Court of Appeals stated that the

briefs submitted on appeal "demonstrate a strong possibility that this case may yet be an appropriate one for application of *res judicata* and collateral estoppel [if, as defendants contend, the petitioners,] through the Association of Unit Owners, authorized, financed, and controlled the investigation and prosecution of the *Becherer* plaintiffs' suit, including hiring an attorney and arranging to pay him a combination retainer and contingency fee." *Becherer v. Merrill Lynch, Pierce, Fenner & Smith*, 43 F.3d 1054, 1071 (6th Cir. 1995).

3. Petitioners Injected Themselves Into the District Court's Forum and Consented to the District Court's Exercise of Personal Jurisdiction.

In addition to consenting to the District Court's exercise of personal jurisdiction by actually trying their contract claims against Shelter Seagate before the District Court, petitioners acknowledged in several ways that they were subject to the District Court's personal jurisdiction.

a. The Interpleader

Before the District Court dismissed plaintiffs' claims, the Registry Hotel Corporation filed an interpleader action in the District Court against Shelter Seagate, the *Becherer* class representatives and all other unit owners similarly situated. The hotel's unit owners, including all petitioners, were organized in a formal organization called the Association of Unit Owners of the Registry Hotel ("AUO"). The AUO moved to intervene in the

interpleader action. The District Court allowed intervention and, in its opinion and order dated August 13, 1992, described the interpleader action as ancillary to the *Becherer* litigation.

b. The Florida Foreclosure Actions

While both the *Becherer* litigation and the interpleader action were pending before the District Court, Trustbank, which provided mortgage loans to unit owners to finance their investment in the Hotel, began foreclosure actions in Florida against a number of unit owners that refused to pay their mortgages. Those unit owners, many of whom are petitioners here, filed counterclaims in the Florida foreclosure proceedings nearly identical to the *Becherer* class action complaint. Thomas Grady, petitioners' counsel here, represents petitioners in those foreclosure actions. Class counsel appears as co-counsel with Grady in many of those actions.

The unit owners moved the Florida court for a stay of the foreclosure actions pending the District Court's decisions and orders in *Becherer* arguing in its brief that a stay was appropriate because "[a]ny judgment in the class action lawsuit will act as an estoppel to Trustbank *and the defendant* from litigating issues common to both causes of action which are actually litigated and decided in the prior action." The Florida Second District Court of Appeal stayed the Florida foreclosure actions pending the District Court's decision in *Becherer*. *Dykes v. Trustbank Sav., F.S.B.*, 567 So.2d 958 (Fla. Ct. App. 2d Dist. 1990).

c. The Florida Action to Compel Arbitration with the AUO

In April of 1990, Shelter Seagate, in an effort to resolve a dispute with the AUO about management and agency fees to which it believed it was entitled, filed a notice of arbitration against the AUO with the American Arbitration Association. The AUO refused to arbitrate, forcing Shelter Seagate to file an action in Florida state court seeking to compel arbitration. On August 29, 1990, the AUO filed a motion to stay Shelter Seagate's efforts to compel arbitration pending the District Court's decision in *Becherer*. In its brief in support of its motion to stay the proceedings, the AUO asserted that the District Court in *Becherer* had personal jurisdiction over the individual unit owners and that the parties before the District Court in *Becherer* and the parties before the Florida court were identical. The AUO stated in its brief, "[a]lthough the AUO is not named in the class action, these actions involve the same parties." In further support of its motion for a stay, the AUO argued that a stay of the Florida action to compel arbitration was appropriate because the decision of the District Court in *Becherer* would be *res judicata* in the Florida action.

In addition to the AUO's intervention in the interpleader action and its request to the Florida state court that the motion to compel arbitration be stayed pending the outcome of *Becherer*, the AUO formally participated in *Becherer* by filing briefs and by negotiating for nine months with the defendants to achieve the provisional settlement of not only *Becherer* but also the interpleader action and the Florida action to compel arbitration.

4. Proceedings Relating to the District Court's March 24, 1992 Order

During the nine months of settlement negotiations, a rift developed between Elwood Simon, counsel for the class, who supported the settlement, and Thomas Grady, counsel for petitioners, who opposed the settlement. This dispute prompted Grady to instruct Simon not to communicate with petitioners. Grady also instructed counsel for the AUO not to communicate with petitioners.

Simon asked the District Court to intervene and the District Court held a hearing regarding appropriate communications between the unit owners' lawyers and the class. The Court then issued an order requiring all three lawyers "to impart only accurate, objective and balanced information *regarding the settlement* . . . . "

By the spring of 1992, the settlement was defeated and at that point, the settlement communication Order expired.

SUMMARY OF ARGUMENT

A writ of certiorari should not issue because the case involves no important question of federal law and is not ripe for review. Petitioners seek this Court's review because they claim that the District Court departed from the accepted and usual course of judicial proceedings, and that the Court of Appeals sanctioned that departure. Both the determination of the jurisdictional basis a federal court requires to enjoin a state court proceeding and

the issuance of the March 24, 1992 Order, however, involved standard applications of law that do not warrant review by this Court. Moreover, the Court of Appeals vacated the injunction about which petitioners complain and remanded the case to the District Court for an evidentiary hearing on whether application of the doctrine of virtual representation will allow reissuance of an injunction to bar petitioners from relitigating claims already decided by the District Court.

The questions presented, moreover, are not appropriate for the exercise of this Court's jurisdiction because the rulings below do not conflict with the holdings of this Court or any other Circuit Court of Appeals and they are consistent with the application of existing law.

The District Court has personal jurisdiction over petitioners as petitioners have repeatedly injected themselves into the District Court's forum. Petitioners' challenge to the District Court's March 24, 1992 Order is moot because that Order lapsed almost three years ago. Moreover, the District Court properly issued its March 24, 1992 Order in accordance with its powers under Fed. R. Civ. P. 23(d) to control the proceedings of class actions.

REASONS TO DENY THE WRIT

I. BECAUSE THE COURT OF APPEALS REMANDED THIS CASE TO THE DISTRICT COURT, THE CASE IS NOT RIPE FOR REVIEW.

Petitioners seek this Court's review to overturn the Court of Appeals' decision vacating the District Court's

injunction and remanding the case for further factual findings. In effect, petitioners seek to prevent the District Court's reconsideration of its injunction enjoining petitioners from pursuing their claims in Florida state court. As such, the issue is not ripe for review by this Court. *See Brotherhood of Locomotive Firemen & Enginemen v. Bangor & A.R. Co.*, 389 U.S. 327, 328 (1967) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court.")

II. PETITIONERS HAD SUFFICIENT MINIMUM CONTACTS WITH THE DISTRICT COURT TO ALLOW ITS EXERCISE OF PERSONAL JURISDICTION OVER THEM.

Petitioners misstate the jurisdictional basis upon which the District Court enjoined the Florida state court proceedings. Petitioners claim that the District Court did not have personal jurisdiction over them and so was without authority to enjoin the subsequent Florida state court action under the relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283. This claim is incorrect because petitioners had already submitted themselves to the personal jurisdiction of the District Court when they participated as class members in a trial against Shelter Seagate; when they participated in an interpleader action ancillary to *Becherer*, and before the same District Court; when the AUO, an organization to which each petitioner belongs, formally and informally participated in *Becherer* by filing briefs; and when they participated for nine months in settlement negotiations.

Petitioners, by repeatedly seeking substantive relief from the District Court, have waived any objection to personal jurisdiction. A party can voluntarily or involuntarily waive its objections to personal jurisdiction. *See White v. National Football League*, 41 F.3d 402, 407 (8th Cir. 1994); *Trans World Airlines v. Mattox*, 897 F.2d 773, 786 (5th Cir.), *cert. denied*, 498 U.S. 926 (1990); *see also Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 704-05 (1982) (stating that a party may legally submit to the jurisdiction, "whether voluntary or not"). Thus, "[i]f a party enters a case, makes no objection to jurisdiction, and asks the court to act on its behalf in some substantive way, it will be held to have waived further objection." *Grammenos v. Lemos*, 457 F.2d 1067, 1070 (2d Cir. 1972), *quoted in Trans World Airlines*, 897 F.2d at 786, *and Cactus Pipe & Supply Co. v. M/V Montmartre*, 756 F.2d 1103, 1108 (5th Cir. 1985); *see also In re Real Estate Title & Settlement Servs. Antitrust Litig.*, 869 F.2d 760, 771 (3d Cir.) ("Of course, a party should be deemed to consent to personal jurisdiction if it actually litigates . . . the underlying merits of the class action . . . . "), *cert. denied sub nom., Chicago Title Ins. Co. v. Tuscon Unified Sch. Dist.*, 493 U.S. 821 (1989).

Actions that a court will construe as a waiver of personal jurisdiction include active participation in discovery, filing of motions, participation in a trial, intervention into an action, and objection to a class settlement. *White*, 41 F.3d at 407-08; *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1558 n.5 (3d Cir.), *cert. denied*, 115 S. Ct. 480 (1994); *Trans World Airlines*, 897 F.2d at 786-87. All of these actions are present here.

Petitioners actively participated in the litigation because they were part of the plaintiff class in an expedited trial of breach of contract claims against Shelter Seagate. The AUO intervened in the ancillary interpleader action before the District Court on behalf of all its members including petitioners. Some petitioners filed a notice of appearance and objection to the provisional class settlement. All petitioners participated in settlement negotiations through the AUO. Petitioners have submitted to the District Court, have accepted, and at times welcomed, the District Court's action on their behalf and have thereby waived any objection to personal jurisdiction.

Petitioners argue that in a class action, the *only* way a Court may obtain personal jurisdiction of class members is by notice and opportunity to opt out of the class on every litigated issue. This argument must fail. Indeed, in *Carlough v. Amchem Products*, 10 F.3d 189 (3rd Cir. 1993), a case relied upon heavily by petitioners, the court held that an injunction could not be entered against an absent class member *only* when there were no other minimum contacts with the forum *and* when they were denied the opportunity to opt out of the class.

In the case at bar, petitioners had more than just minimum contacts with the forum; they participated both formally and informally in the *Becherer* litigation as well as in ancillary cases. Moreover, at the evidentiary hearing that has been ordered on remand, there will likely be evidence of additional contacts petitioners have had with the District Court.

Petitioners' boldly stated and oft repeated assertion that the District Court lacked personal jurisdiction is

absurd because each petitioner opted into the District Court's personal jurisdiction when they became part of the class on the contract claims. Given that, petitioners are forced to argue that if the Court offers the class an opportunity to opt out of a settlement, it loses the personal jurisdiction it had gained before. This cannot be, because once petitioners consent to the jurisdiction of the District Court for one purpose, they consent for all purposes in the litigation. For example, a plaintiff is deemed to consent to the forum court's jurisdiction for all counterclaims, including non-compulsory counterclaims. *Dewey & Almy Chemical Co. v. Johnson, Drake & Piper, Inc.*, 25 F. Supp. 1021, 1022 (D.C.N.Y. 1939). Thus, in this case petitioners' position that the District Court did not have personal jurisdiction should be flatly rejected.[1]

III. UNDER TRADITIONAL PRINCIPLES OF *RES JUDICATA* AND COLLATERAL ESTOPPEL, THE DISTRICT COURT MAY PROPERLY ENJOIN PETITIONERS' STATE COURT PROCEEDINGS UNDER THE ANTI-INJUNCTION ACT UPON FINDING PETITIONERS IN PRIVITY WITH THE PARTIES BEFORE IT.

Under the relitigation exception to the Anti-Injunction Act, the District Court may *"enjoin a party before it* from attempting to relitigate an issue in a state court, to

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[1] In their brief at p.15 petitioners state, "No one contests that Petitioners lacked the requisite minimum contacts and that Petitioners did not consent to personal jurisdiction." In point of fact, everyone, including the District Court, the Court of Appeals and all defendants, contests that proposition.

'prevent any interference' with the federal court's judgment." *In re Ocean Ranger Sinking Off Newfoundland*, 617 F. Supp. 435, 436 (E.D. La. 1985) (citation omitted). The District Court may also enjoin non-parties who are in privity with parties before it. *Royal Ins. Co. v. Quinn-L Capital Corp.*, 960 F.2d 1286, 1297 (5th Cir. 1992), *cert. denied*, 114 S. Ct. 1541 (1994); *Amalgamated Sugar Co. v. NL Industries, Inc.*, 667 F. Supp. 87, 94-5 (S.D.N.Y. 1987); *Southwest Airlines Co. v. Texas International Airlines, Inc.*, 396 F. Supp. 678, 686 (N.D. Tex. 1977), *aff'd* 546 F.2d 84 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977). A court will find a non-party to be in privity with a named party in a prior suit "where the party to the first suit is so closely aligned with the nonparty's interests as to be his 'virtual representative.' " *Royal Ins. Co.*, 960 F.2d at 1297 (citations omitted).

The Circuit Courts of Appeals agree that whether privity exists is a question of fact for the trial court. *See Thompson v. Freeman*, 648 F.2d 1144, 1147 (8th Cir. 1981); *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 719 (5th Cir.), *cert. denied sub nom., Metropolitan Dade County v. Aerojet-General Corp.*, 423 U.S. 1026 (1975); *see also Gerrard v. Larsen*, 517 F.2d 1127, 1135 (8th Cir. 1975) (remanding the case for a factual determination on issues of privity); *cf. NLRB v. Schnell Tool & Die Corp.*, 359 F.2d 39, 44 (6th Cir. 1966) (advising the plaintiff to bring supplemental proceedings before the National Labor Relations Board to determine issues of privity).

The District Court and the Court of Appeals did not err, much less depart from the accepted and usual course of judicial proceedings, in determining that the District Court could enjoin petitioners' state court proceedings if

the class plaintiffs "virtually represented" the interests of petitioners. Furthermore, the Court of Appeals did not depart from the standard course of proceedings in remanding the case to allow the District Court to make factual findings on this issue.

The decision of the Court of Appeals to remand the case for further factual findings is particularly appropriate given the likelihood that the District Court will find the parties before it virtually represented petitioners. Courts seeking to determine whether a named party was the virtual representative of a non-party consider such factors as the non-party's participation in the first trial, the non-party's apparent consent to be bound, apparent tactical maneuvering and the non-party's relationship to the named party. 18 C. Wright, et al., *Federal Practice and Procedure* § 4457 (1981 and Supp. 1995), all of which are present in this case.

Again, all petitioners participated in an expedited trial in the District Court on their breach of contract claims. Some petitioners filed an objection to the provisional settlement in the District Court. The belated filing of state court arbitration proceedings and the preliminary blocking of state court foreclosure proceedings by arguing the *res judicata* effect of *Becherer*, are examples of petitioners' tactical maneuvering. Finally, the AUO admits its members, including petitioners, are identical to the plaintiff class. Hence, the District Court would not depart from the accepted and usual course of proceedings on remand if it were to find that the parties before it virtually represented petitioners' interests.

IV. BECAUSE THE DISTRICT COURT'S MARCH 24, 1992 ORDER LAPSED WHEN THE PROPOSED SETTLEMENT FAILED, QUESTIONS REGARDING THE ORDER'S CONSTITUTIONALITY ARE MOOT.

The District Court's March 24, 1992 Order, which directed counsel to provide class members with "accurate, objective, balanced information regarding the settlement," lapsed when the settlement failed. In cases in which an alleged violation has ceased and likely will not recur, or where interim events have "completely and irrevocably eradicated the effects of the alleged violation," the issues raised regarding the alleged violation become moot. *Finberg v. Sullivan*, 658 F.2d 93, 97-98 (3d Cir. 1980); *see also Super Tire Engineering Co. v. McCorkle*, 469 F.2d 911, 916 n.10 (3d Cir. 1972) ("Cases dealing with elections that have taken place, orders that have expired before review, and injunctions that have lapsed . . . are a third type of case in which mootness occurs."), *rev'd on other grounds*, 416 U.S. 115 (1974). Thus, as the Court of Appeals determined, petitioners' claims surrounding the purported unconstitutionality of the District Court's March 24, 1992 Order are moot. As such, this Court should decline to hear them.

V. THE DISTRICT COURT'S MARCH 24, 1992 ORDER REPRESENTS A STANDARD EXERCISE OF THE DISTRICT COURT'S POWERS TO CONTROL CLASS ACTION LITIGATION.

The District Court's March 24, 1992 Order represented a proper exercise of the District Court's powers

under Fed. R. Civ. P. 23(d) to control class action litigation. According to Fed. R. Civ. P. 23(d)(3), a District Court may make orders that "impose conditions on the representative parties or on intervenors." Such conditions may not "create unwarranted barriers to class suits." 7B C. Wright, et al., *Federal Practice and Procedure* § 1794 (1986). For example, a court may not require parties to receive prior judicial approval before communicating with counsel or third parties. *Id.* A court may, however, place conditions on a counsel's communication with parties so long as a specific record supports the order, and so long as the order is narrowly drawn and specific. *Id.*

In this case, as mentioned above, the District Court did not prohibit communications between petitioners and their counsel, nor did it require prior judicial approval of any communications. Rather, the District Court required only that the communication from any of the lawyers representing petitioners (class counsel, petitioners' counsel, and AUO counsel) be accurate, objective, and balanced. Furthermore, the District Court limited its order to communications regarding the settlement. The District Court's order was thus narrowly drawn, specific, and directed to *all* involved counsel.

In addition, the District Court issued its Order only after holding a hearing to consider petitioners' counsel's demand that direct communications between petitioners and class counsel be terminated. At that hearing, the District Court determined that the settlement approval process could be undermined because of inaccurate advice rendered by any of the counsel. Hence, the District Court established a specific record supporting its order. The District Court, therefore, did not depart from the

accepted and usual course of proceedings when it issued the March 24, 1992 Order.

CONCLUSION

For all the reasons stated above, this Court should deny the petition for a writ of certiorari.

Dated this 26th day of July, 1995

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